ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION II

CACR06-652

May 2, 2007

DALLAS GENE ROY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT
[NO. CR-2004-264]

HON. JOHN DAN KEMP, JR.
JUDGE

AFFIRMED

The appellant in this first-degree murder case admitted at his bench trial that he shot the decedent five times and killed him, but asserted it was justifiably done in self-defense. The trial court found him guilty and sentenced him to imprisonment for a term of thirty-five years. On appeal, he argues that the evidence is not sufficient to show he acted purposefully, that the trial court erred in denying his motion for a continuance, and that the trial court erroneously sustained two hearsay objections raised at trial. We affirm.

In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* In

determining whether the evidence is substantial, we view the evidence in the light most favorable to the verdict and consider only the evidence supporting the verdict. *Id.*

Here, the evidence is plainly sufficient to support the conviction. There was evidence that appellant and the decedent were intoxicated and had been arguing on the night in question, that appellant threatened to shoot decedent, that appellant left decedent's home, and that appellant returned. The appellant himself admitted that he emptied a nine-shot revolver at decedent, hitting him five times in the region of the head and neck. The trial court was not required to believe appellant's testimony that decedent attacked him. *See, e.g., Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

With regard to appellant's assertion that the trial court erred in denying his request for a continuance, the record shows that appellant requested a continuance in mid-trial when a physician witness that the defense wished to call did not appear at trial. Appellant's attorney stated that the witness was under subpoena, but the attorney failed to produce the return. No subpoena for the witness appears in the record. When deciding whether a continuance should be granted, the trial court should consider the diligence of the movant; the probable effect of the testimony at trial; the likelihood of procuring attendance of the witness in the event of a postponement; and filing of an affidavit stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Hathcock v. State*, 357 Ark. 563, 182 S.W.3d 152 (2004). Here the record before us does not demonstrate that appellant showed diligence, and appellant has filed no affidavit. The supreme court has consistently held that Ark. Code Ann. § 16-63-402(a) (1987) requires the presence of an affidavit in order to justify

a continuance due to a missing witness. *Clark v. State*, 358 Ark. 469, 192 S.W.3d 248 (2004). The trial court did not abuse its discretion in denying the requested continuance.

Finally, appellant argues that the trial court erred in two instances by refusing to admit evidence favorable to the defense on the ground that the evidence was hearsay. Both instances involved attempts by the defense to introduce evidence concerning a medical examination, conducted on appellant seven months after the murder, for treatment of a neck injury appellant assertedly sustained in his alleged struggle with decedent. We find no reversible error. We cannot determine whether any error in refusing to hear appellant's testimony was prejudicial because appellant made no proffer and it was not clear from the context what he was attempting to show. Appellant also sought to introduce medical records prepared by that physician in connection with his examination. However, these medical records are essentially without relevance to appellant's claim of self-defense because they describe appellant's spinal condition as congenital and attribute no cause to the condition other than to recite the self-serving history related by appellant, while he was a prisoner awaiting trial, concerning the alleged attack upon him made by the victim that was the lynchpin of appellant's claim of self-defense. However, testimony concerning this alleged attack was already before the trial court because appellant took the stand at trial and testified at length concerning the alleged attack upon him by the decedent. Under these circumstances, we hold that appellant has failed to demonstrate that he was prejudiced by any error that may have occurred regarding the admission of these items of evidence. *See Windsor v. State,* 338 Ark. 649, 1 S.W.3d 20 (1999).

Affirmed.

MARSHALL and MILLER, JJ., agree.